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TITLE: Evaluation of, and Additional Guidance on,
Issuance of Unilateral Administrative Orders
(UAOs) for RD/RA

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Title: Evaluation of, and Additional Guidance on, Issuance of Unilateral Administrative Orders (UAOs) for RD/RA				
Summary of Document: The purpose of this directive is to present you with the results of a recent evaluation conducted by the Office of Waste Programs Enforcement (OWPE) of the selection process EPA uses in issuing UAOs to Potentially Responsible Parties (PRPs) for RD/RA under CERCLA; and, based on the evaluation, to give further guidance on the process we should use to select recipients of UAOs.				
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 20 1991

OSWER Directive No. 9833.2c

MEMORANDUM

SUBJECT: Evaluation of, and Additional Guidance on, Issuance of Unilateral Administrative Orders (UAOs) for RD/RA

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The purpose of this directive is to present you with the results of a recent evaluation conducted by the Office of Waste Programs Enforcement (OWPE) of the selection process EPA uses in issuing UAOs to Potentially Responsible Parties (PRPs) for RD/RA under CERCLA; and, based on the evaluation, to give further guidance on the process we should use to select recipients of UAOs.

The evaluation was requested by the Deputy Administrator, who was concerned about criticisms expressed by some PRP groups about which PRPs at a site receive UAOs. There have been complaints, for example, that EPA unfairly singles out "deep pockets" when issuing UAOs.

The evaluation consisted both of interviewing Regional managers to determine their approach to issuing orders, and of examining each order issued in FY 1990 to determine the numbers of PRPs issued general notice, special notice, and UAOs, and the reasons for any discrepancies among these numbers.

Findings

Overall, the process Regions are using to select PRPs for UAO issuance appears to be reasonable and fair. Not all PRPs identified at a site are routinely included when UAOs are issued, but the reasons for selection appear to relate to legitimate matters of enforceability and sound enforcement discretion.

The evaluation found that in the majority of cases, UAOs were issued to fewer than all the PRPs given general or special notice at a site. UAOs were issued to all PRPs identified for the site at 10 out of the 44 sites for which UAOs for RD/RA were issued in FY 1990. For these 10 sites, the number of PRPs is low (fewer than 10 PRPs).

At the other 34 sites, where UAOs were issued to fewer PRPs than were given either general or special notice, the difference between the number of PRPs given notice and those issued orders varies considerably. In some cases the discrepancy is very small; for example, at one site all but one of the ten PRPs issued special notice received UAOs. In other cases the difference is very large: as few as a dozen PRPs may be given orders out of several hundred PRPs given general notice.

The results of both the survey of FY 1990 UAOs and the survey of Branch Chiefs are consistent regarding the most important factors in determining which PRPs receive UAOs. Strength of the liability case and financial viability were given as the two most important factors by the Branch Chiefs, and the individual surveys of each site revealed that these were the two most frequent reasons given for PRP selection. Also consistent between the surveys is the relative significance of these two factors: strength of the liability case is the foremost consideration for Branch Chiefs, and it is given as a factor at over twice as many sites as viability. Overall, strength of the liability case is a determinative factor in selecting among PRPs to receive orders in three-fourths of the cases in which fewer than all PRPs received orders.

Other important factors identified both in the survey of Branch Chiefs and in individual orders include contribution by volume, administrative practicality, and separate settlements. Volumetric contribution was the third most frequently given factor in explaining selection at sites. Clearly, there is a connection between this factor and administrative practicality, and both are

¹ This does not mean that liability was not considered in the remaining one-fourth of the cases. Liability is always considered in issuing UAOs, but in a quarter of the cases other factors (e.g., viability or administrative practicality) were responsible for the decision not to issue an order to a given PRP.

consistent with EPA guidance on use of UAOs, which suggests issuing orders to the largest manageable number of PRPs. In addition, in several cases fewer PRPs were issued orders than were given notice because the remaining PRPs settled separately for a portion of the cleanup or costs involved.

The evaluation also revealed that recipients of orders generally are responsible for a large majority of the waste covered by the orders. Although not required under CERCLA's scheme of joint and several liability, EPA generally strives to include those PRPs to whom the bulk of the waste at issue may be attributed.

Conclusions and Follow-up

Our evaluation indicates that there is not a serious problem with the way Regions are using UAOs for RD/RA work. Consideration of such factors as liability, viability, and, in certain cases, volumetric contribution makes sense before we commit to the serious action of issuing unilateral orders.

We have initiated some follow-up work to determine whether bias toward large, financially solvent responsible parties may be built into the system earlier in the PRP search process. There may be good reasons to consider such PRPs, who tend to be large contributors and for whom there are usually good records of waste transactions. We want to be sure, however, that during the PRP search large, solvent parties are not arbitrarily singled out to the exclusion of other contributors or liable parties. Preliminary results of an examination of the PRP search process have indicated that such a bias does not exist.

Additional Guidance

Based on the findings of the evaluation, we are not recommending any essential changes to the current process by which PRPs are selected for receiving orders. Regions appear to be selecting recipients of UAOs appropriately and in accordance with the "Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions," OSWER Directive No. 9833.0-1a.

We encourage you, however, to ensure that you avoid a bias, or even the appearance of a bias, toward issuing orders only to large, "deep pocket" PRPs. Although many such PRPs may be large contributors and may be able to pay for response, we must continue to make reasonable efforts to identify all parties with CERCLA liability at a site and to arrange for or compel cleanup from as many of them as practicable. On the other hand, we must ensure that we have adequate evidence against all parties to whom we issue orders, and we should consider the economic viability of order

recipients. Where it is necessary to select among liable, viable PRPs, volumetric contribution is a legitimate factor in reducing the named parties to a practicable number. Other factors, of course, may also enter into a decision to select among PRPs.

It is important to note that questions have also been raised about issuing orders to parties at the other end of the spectrum -- clearly non-viable parties, such as destitute or nearly destitute individuals, who may be getting orders that in formal terms require them to perform cleanup work costing millions of dollars. Please be aware that the above-referenced guidance suggests that orders involving expenditures of money should generally not be issued to PRPs that lack any substantial resources.

Again, this is general advice, and site-specific factors may make inclusion of persons of little means appropriate in individual cases. In particular, it may be useful to issue UAOs to site owners regardless of their financial circumstances. However, in such cases it may sometimes be preferable to issue separate orders for access or cooperation to indigent parties rather than to include them in an overall response order.

Similar caution is advisable when dealing with other distressed or disadvantaged individuals who, from an equitable point of view, may not be appropriate recipients of a unilateral order.

Further Information

If you have any questions about the evaluation and follow-up or about the guidance presented here, please call us or have your staff contact Arthur Weissman in the Office of Waste Programs Enforcement at FTS 382-4826 or Leonard Shen in the Office of Enforcement at FTS 382-3107. We thank you for your cooperation in this matter, and for your sensitivity to the important issues involved.

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cc: Regional Enforcement Branch Chiefs
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